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No. 14

In the
Supreme Court of the United States

MARTIN MARCEAU; CANDICE LAMOTT; JULIE RATTLER; JOSEPH RATTLER, JR.; JOHN G. EDWARDS; MARY J. GRANT; GRAY GRANT; DEANA MOUNTAIN CHIEF, on behalf of themselves and others similarly situated,

Petitioner,

v.

BLACKFEET HOUSING AUTHORITY, and its board members; SANDRA CALFBOSSRIBS; NEVA RUNNING WOLF; KELLY EDWARDS; URSULA SPOTTED BEAR; MELVIN MARTINEZ, Secretary; DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, United States of America,

Respondent.

On Petition For A Writ of Certiorari To The United States Court Of Appeals For the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the statutes, regulations and HUD requirements were so pervasive that federal control over Indian housing construction created a trust responsibility towards Indians which the Complaint alleges was violated in this case. See *United States v. Mitchell*, 463 U.S. 206, 218-224 (1983); *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 468-477 (2003).

PARTIES

The Petitioners are Martin Marceau; Candice Lamott; Julie Rattler; Joseph Rattler, Jr.; John G. Edwards; Mary J. Grant; Gray Grant; Deana Mountain Chief who are purchasers and residents of Indian Housing built and paid for by Defendants.

Respondents Blackfeet Housing Authority, and its board members; Sandra Calfbossribs; Neva Running Wolf; Kelly Edwards, Ursula Spotted Bear, Melvin Martinez, Secretary; Department of Housing and Urban Development, United States of America are responsible for the funding, construction and maintenance of the houses in question.

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1.

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully requests this Court issue a Writ of certiorari to review the opinion of the Ninth Circuit Court of Appeals entered on August 22, 2008.

OPINION BELOW

The Ninth Circuit Court of Appeals filed its Order and Amended Opinion August 22, 2008, and selected this decision for publication. See 540 F.3d 916 (9th Cir.2008). It had previously filed an Order and Amended Opinion on March 19, 2008, published at 519 F.3d 838 (9th Cir. 2008) after rehearing before a three-judge panel on May 9, 2007. The initial Order and Opinion of July 21, 2006, published at 455 F.3d 974 (9th Cir. 2006) was replaced in part and adopted in part. The Amended Opinion of March 19, 2008 appearing at 519 F.3d 838 (9th Cir. 2008) was replaced in its entirety.

2.

JURISDICTION

The Ninth Circuit filed its decision on August 22, 2008, and entered an order denying Defendants'/Respondents' motions for rehearing and for rehearing en banc on August 22, 2008. This Court has jurisdiction under 28 U.S.C. §1254(1) to review the circuit court's decision on a writ of certiorari.

STATUTORY PROVISIONS INVOLVED

1. United States Housing Act of 1937 and 1949, 42 USC §1437-1437x.
2. The National Housing Act 12 U.S.C §§17151(a) and 1738(a).
3. The Indian Housing Act of 1988 42 U.S.C. §1437aa-ff.
4. The Native American Housing and Self-Determination Act of 1996 (NAHASDA) 25 U.S.C. §§1702-1750.

STATEMENT OF FACTS

Petitioners adopt the Ninth Circuit's Statement of Facts as follows:

"The Blackfeet Tribe is a federally recognized Indian tribe. In January 1977, the Tribe established a separate entity, the Blackfeet

("Housing Authority"). *See* C.F.R. §805.109(c) (1977) (requiring, as a prerequisite to receiving block grant from the United States Department of Housing and Urban Development ("HUD"), that a tribe form a HUD-approved tribal housing authority). The Blackfeet Tribe adopted HUD's model enabling ordinance. Blackfeet Tribal Ordinance No. 7, art. II, §§1-2 (Jan. 4, 1977), *reprinted in* 24 C.F.R. §805, subpt. A, app. I (1977). Thereafter, HUD granted the Blackfeet Housing Authority authorization and funding to build 153 houses on the Blackfeet Reservation.

"Construction of those houses, and some additional ones, began after the Housing Authority came into being in 1977. Construction was completed by 1980. The houses-at least in retrospect-were not well constructed. They had wooden foundations, and the wood products used in the foundations were pressure-treated with toxic chemicals. The crux of Plaintiff's complaint is that HUD directed the use of pressure-treated wooden foundations, over the objection of tribal members, and that the Housing Authority acceded to that directive.

"In the ensuing years, the foundations became vulnerable to the accumulation of moisture, including both groundwater and septic flooding, and to structural instability. Some of the houses have become uninhabitable due to contamination from toxic mold and dried sewage residues.

The residents of the houses have experienced health problems, including frequent nosebleeds, hoarseness, headaches, malaise, asthma, kidney failure, and cancer.

"Plaintiffs bought or leased the houses, either directly or indirectly, from the Housing Authority. After it became clear that the houses were unsafe or uninhabitable, Plaintiffs asked the Housing Authority and HUD to repair the existing houses, provide them with new houses, or pay them enough money to repair the houses or acquire substitute housing. When they received no help from either entity, Plaintiffs filed this class action... ." 540 F.3d at 919-920, App. 7-8.

Judge Pregerson, in dissent, adds this significant additional fact:

> Plaintiffs allege, as the crux of their claim that HUD *required* the use of wood foundations over the objections of Tribal members, and that the Housing Authority acceded to that directive.

540 F.3d at 930, App. 27.

Judge Pregerson also outlines the home ownership program that is critical to an understanding of this case as follows:

"Pursuant to the goals set out in the United States Housing Act of 1937, 42 U.S.C. §§1437-1440, HUD developed the Homeownership Program. HUD designed the Homeownership Program to meet the housing needs of low-income American Indian families. HUD entered into agreements called 'Annual Contributions Contracts' with tribal housing authorities under which HUD agreed to provide a specified amount of money to fund projects undertaken by the housing authority and pre-approved by HUD. *See* 24 C.F.R. §805.102 (1979); *id.* §805.206. After securing funding from HUD, a tribal housing authority would then contract with eligible American Indian families. *See id.* §805.406. The program required families to contribute land, labor, or materials to the building of their house, *see id.* §805.408, and after occupying the house, each family made monthly payments in an amount calibrated to their income, *see id.* §805.416(a)(1)(ii). The home-buyers were responsible for maintenance of the house. *See id.* §805.418(a).

"Until 1988, when the program was formalized in the Indian Housing Act of 1988, 42 U.S.C. §§1437aa-1437ee (1988), *repealed by* Native American Housing Assistance and Self-Determination Act of 1996, Pub. L. No. 104-330, 110 Stat. 4016 (1996), HUD operated the Homeownership Program under a series of regulations and its "Indian Housing Handbook." *See* H.R. Rep. No. 100-604 (1988),

reprinted in 1988 U.S. C.C.A.N. 791, 793." 540 F.3d at 930, App. 26.

PROCEDURAL BACKGROUND

Plaintiffs filed a class action against the Housing Authority, the board members of the Housing Authority, HUD, and the Secretary of HUD. Plaintiffs seek declaratory and injunctive relief and damages for alleged violations of statutory, contractual and fiduciary duties.

HUD filed a motion to dismiss for lack of subject matter jurisdiction and a motion to dismiss for failure to state a claim upon which relief can be granted. The Housing Authority and its board members filed a motion to dismiss because of tribal immunity. The district court granted those motions. 540 F.3d at 919-20, App. 8.

Plaintiffs appealed to the Ninth Circuit Court of Appeals. In its initial opinion Ninth Circuit affirmed the dismissal of HUD and its Secretary, but reversed with respect to the Housing Authority. *Marceau v. Blackfeet Hous. Auth. (Marceau I)*, 455 F.3d 974 (9th Cir. 2006)(App.92-121). The Ninth Circuit then granted the Housing Authority's petition for rehearing and issued an amended opinion affirming its reversal with respect to the Housing Authority but further reversing the district court's dismissal of the Administrative Procedures Act count against HUD. *Marceau v. Blackfeet Hous. Auth.*

(Marceau II), 519 F.3d 838 (9th Cir. 2008)(App. 75-121). The Housing Authority and HUD filed separate petitions for panel rehearing and review en banc. The Ninth Circuit then issued its second amended opinion that is the subject of this petition. *Marceau v. Blackfeet Hous. Auth.* (Marceau III), 540 F.3rd 916 (9th Cir. 2008) (App. 1-45).

In Marceau III, The Ninth Circuit remanded the case against the Housing Authority to the district court with instructions to stay, rather than dismiss, the action against the Housing Authority while Plaintiffs exhaust their tribal court remedies. 540 F.3d at 921, App. 9-10.

Second, over a strong dissent of presiding Judge Pregerson, the Ninth Circuit refused to reverse the district court's dismissal of Plaintiffs' claim that the federal government breached its trust responsibility to Indians. The majority of the panel held that the laws, regulations and handbook requirements failed to establish that the federal government exercised direct control over Indian houses or money. 540 F.3rd 927-28, App. 21-22. By contrast, Judge Pregerson stated that HUD's control of housing on tribal land and the Homeownership Program was so pervasive that the Tribe and its members had little control over how HUD housing would be built and no power to control the materials used. The pervasive regulation of housing on the Blackfeet reservation was exactly like *Mitchell II* and *White Mountain Apache*. Thus, Judge Pregerson

would hold that the government breached its fiduciary duty by requiring the tribes to use substandard, hazardous building materials and refusing to repair or rebuild the homes. 540 F.3rd 940, App. 44-45.

As to the Administrative Procedure Act claim that HUD should be ordered to "fix it," the Ninth Circuit unanimously held that the claim was not barred even if it did require money to fix it because the request for an injunction was not a claim for money damages. See *Bowen v. Massachusetts,* 4897 U.S. 879, 895 (1988). Thus, this count was remanded to the district court to determine whether HUD failed to comply with its own regulations and whether arsenic-treated lumber was within industry standards at the time. 540 F.3rd 928-29, App. 23-25.

Finally, the Ninth Circuit reaffirmed its earlier determination that the district court lacked jurisdiction to hear the breach of contract claims against HUD. 540 F.3rd 929, App. 25.

This Petition addresses only the second issue, namely, whether the federal government violated its trust responsibility to Indians.

REASONS FOR GRANTING THE PETITION:

I.
There is a Conflict in the Circuits. This Case from the Ninth Circuit Is

Diametrically Opposed to a Decision of the Federal Circuit in *Navajo Nation v. United States*, 501 F.3d 1327.

The majority opinion from the Ninth Circuit panel below rejected the notion of federal trust responsibility upon the grounds and for the reasons that the statute and regulations regarding Indian housing were not, in and of themselves, sufficient to show the necessary control for Indian trust responsibility under *United States v. Mitchell*, 463 U.S. 206, 224-26 (1983) ("*Mitchell II*") and *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 474-76 (2003) ("*White Mountain Apache*").

The majority stated, over a strong dissent from presiding Judge Pregerson, that the test for federal trust responsibility for Indians cannot depend upon what people do in implementing or administering the statutes and regulations. Whether or not the statutes and regulations are administered by people acting arbitrary, capriciously, or unwisely does not matter. The statutes and regulations themselves must be so pervasive that there is federal control or supervision to meet the test.

> Although we must take as true Plaintiffs' allegations that HUD in fact required the use of wooden foundations and that that those foundations caused injury, the government did not enter into a trust relationship merely because HUD did not

> approve an alternative design. Although HUD's power to approve a design implies the power to reject a design as well, the supreme court made clear in *Mitchell I* and *Navajo Nation* that such oversight authority alone (whether exercised wisely or unwisely) cannot create the legal relationship that is a threshold requirement for plaintiffs to recover on a trust theory. Even if HUD's actions in mandating certain construction materials and methods may have been arbitrary or capricious, those actions alone cannot alter the legal relationship between the parties.

540 F.3d at 927-28, App. 21-22.

By contrast, the Federal Circuit has held exactly the opposite. *Navajo Nation v. United States*, 501 F.3d 1327, 1335-36 (2007) (Rehearing and Rehearing En Banc denied 2008), cert. granted October 1, 2008, 129 S. Ct. 30, 76 U.S. L. W. 3621. In that case, the statute and imple-menting regulations at the time the case arose did not contain the necessary language. Yet the Federal Circuit Panel had no difficulty finding that "the government exerted actual and significant control" over the coal leasing and royalty rate in question.

> While it is true that the regulation was adopted "after the events at issue" *Navajo III*, 537 U.S. at 508, N. 12, 123 S. Ct.

> 1079, the government does not dispute that the asserted sections of 30 C.F.R. Part 206 subpart F describe actual practices that existed at the time of the lease amendments and that such practices are within the Department of the Interior's authority. Where the government exercises actual control within its authority, neither Congress nor the agency needs to codify such actual control for a fiduciary trust relationship that is enforceable by money damages to arise.

501 F.3d at 1342.

The Federal Circuit then quotes from *Mitchell II*:

> [W]here the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise). *Id*; *Mitchell II*, 463 U.S. at 225.

In the instant case the majority of the Ninth Circuit Panel refuses to apply the Indian trust responsibility notwithstanding the overwhelming

factual support for the pervasive control and supervision exercised by the federal government. By contrast, the Federal Circuit, on very similar facts and circumstances, does apply the Indian trust responsibility to the *Navajo Nation* case. Judge Pregerson acknowledges that on their face, the statutes in the instant case only establish a mechanism for lending money to tribal housing authorities. However, when the entire statutory framework including the regulations and the Handbook rules are considered, along with the actual implementation by the regulators are added to the equation, the following conclusion results: "Federal control over the funds and the program is pervasive." 540 F.3d at 940, App. 44 (Pregerson dissenting). Judge Pregerson is exactly correct and is exactly en sync with the Federal Circuit decision in *Navajo Nation*, *supra*.

This Court granted *certiorari* in the *Navajo Nation* case on October 1, 2008. *United States v. Navajo Nation*, i29 S. Ct. 30, 76 U.S. L. W. 3621 (No. 07-1410). The clarification provided by this Court in that case should also apply to the instant case. The Petition for *certiorari* should be granted in this case so the cases can be handled together. See also, *Brown v. United States*, 86 F.3d 1554, 1560 (Fed. Cir. 1996).

II.

The Majority of the Ninth Circuit Panel Misconstrues and Misunderstands This Court's Test for Federal Trust Responsibility to Indians as Expressed in *Mitchell II* and *White Mountain Apache*.

This Court has established a special remedy for breach of the federal trust responsibility owed by the government to Indians. It is outlined in *Mitchell II*," 463 U.S. at 224-26, and *White Mountain Apache*, 537 U.S. at 474-76. As summarized in *White Mountain Apache*, *Mitchell II* found a pervasive role in the government's sale of timber from Indian lands sufficient to trigger the trust responsibility.

> The subsequent case of *Mitchell II* arose on a claim that did look beyond the Allotment Act, and we found that statutes and regulations specifically addressing the management of timber on allotted lands raised the fair implication that the substantive obligations imposed on the United States by these statutes and regulations were enforceable by damages.

White Mountain Apache, 537 U.S. at 473-74.

The issue is whether or not the government has a "pervasive" role which defines the contours of the United States' fiduciary responsibilities beyond the bare or minimum level.

> The Department of the Interior possessed "comprehensive control over the harvesting of Indian timber" and "exercise[d] literally daily supervision over [its] harvesting and management" *Mitchell II supra,* at 209, 222, 103 S. Ct. 296 (quoting *White Mountain Apache Tribe v. Bracker*, 448 US 136, 145, 147, 100 S. Ct. 2578, 65 L.Ed.2nd 665 (1980))(internal quotation marks omitted), giving it a "pervasive" role in the sale of timber from Indian lands under regulations addressing "virtually every aspect of forest management," *Mitchell II supra*, at 219, 220, 103 S. Ct. 2961. As the statutes and regulations gave the United States "full responsibility to manage Indian resources and land for the benefit of the Indians" we held that they "define[d]....contours of the United States' fiduciary responsibilities" beyond the "bare" or minimal level, and thus could "fairly be interpreted as mandating compensation" through money damages if the government faltered in its responsibility. 463 US, at 224-226, 103 S. Ct. 2961.

White Mountain Apache, 573 U.S. at 474.

White Mountain Apache then added the further clarification that the United States' fiduciary responsibilities included a situation in which the United States occupied the property in question. When it does so, there is a fair inference that an obligation exists to preserve the property improvements and the United States may not allow it to fall into ruin on its watch. 537 U.S. at 475.

The two Judges of the Ninth Circuit writing the majority opinion below totally misconstrue this language and these holdings to require that the statutes and regulations in and of themselves to create the pervasive role that constitutes the bare or minimum level of federal involvement. They failed to consider how these statutes and regulations *are administered.* They failed to take into consideration the manner in which the statutes and regulations are carried out.

Any law or rule can be either passive and not oppressive or overwhelming and totally pervasive depending on how it is administered. The majority opinion below takes the erroneous position that the statutes and regulations themselves must be pervasive. The majority opinion below takes the erroneous position that whether or not the people who administer them have acted arbitrarily or capriciously under these statutes and regulations is irrelevant

and immaterial. As they so erroneously stated:

> Although we must take as true Plaintiffs' allegations that HUD in fact required the use of wooden foundations and that that those foundations caused injury, the government did not enter into a trust relationship merely because HUD did not approve an alternative design. Although HUD's power to approve a design implies the power to reject a design as well, the supreme court made clear in *Mitchell I* and *Navajo Nation* that such oversight authority alone (whether exercised wisely or unwisely) cannot create the legal relationship that is a threshold requirement for plaintiffs to recover on a trust theory. Even if HUD's actions in mandating certain construction materials and methods may have been arbitrary or capricious, those actions alone cannot alter the legal relationship between the parties.

540 F.3d at 927-28, App. 21-22.

First, such a proposition is wrong ethically, morally, logically and legally. To separate the administration of a statute or regulation from the text and to suggest that a poor, unwise, and over-zealous interpretation of the statute does not count in determining the existence of a fiduciary duty is

ethically and morally unacceptable. To the Indian victims, who have suffered wrongs at the hands of the United States for many years, it is the same, whether the regulations required the wrong or the persons administering the regulations caused the wrong. Further, it is illogical. We cannot hide our heads in the sand. The result is the same whether an acceptable regulation is administered by an over-zealous administrator or an unacceptable regulation is administered by a prudent regulator. The bottom line is pervasive control. The bottom line is the same control over "virtually every aspect of" housing that exceeds the bare or minimum level of control.

Finally, the proposition is wrong legally. The elaborate control over forest and property belonging to Indians found in *Mitchell II* did not make any such distinction. Control is control whether a corrupt administrator is involved or not. See *Navajo Nation v. United States*, 501 F.3d 1327, 1343 (Fed. Cir. 2007) *cert.* granted, October 1, 2008, 129 Sup. Ct. 30, 76 U.S. L. W. 3621; *Brown v. United States*, 86 F.3d 1554, 1560 (Fed. Cir. 1996).

For the United States government to absolve itself of responsibility by suggesting that the laws and rules were okay but it's just those administrators who caused your losses and your suffering is wrong. It is contrary to the best notions of fairness and justice that brought about the federal trust responsibility in the first place. This issue begs for further consideration by this Court.

Second, this proposition is inconsistent with fundamental trust law. It is, after all, trust law to which we must look. *Mitchell II* refers to the necessary elements of a common law trust. 463 U.S. at 225. "Elementary trust law" is what we must look to in the final analysis. *White Mountain Apache*, 537 U.S. at 475.

The whole concept of trust arose as an equitable remedy in courts of equity. The English Court of Chancery developed this notion. The Courts of Chancery administered the rules and applied principles of equity. While the there is no longer a division between courts of law and courts of equity, the trustee's obligation is still an equitable one.

> "The trustee's obligation is said to be equitable." Originally it was recognized only by the English Court of Chancery, which alone administered the rules and applied the principles of equity. ... [T]he trustee's obligation [is] equitable.

Bogert, Law of Trusts 5, §1 (1973). Accord Restatement 3d Trusts 1, (Introductory Note.)

The requirement to do equity is not uncommon as it relates to trusts. See *Matter of Kuehn,* 308 N.W.2d 398, 399 (S.D. 1981); *Kurowski v. Burch*, 290 N.E.2d 401, 406 (Ill. App. Ct. 1972); see generally Restatement (First) of Trusts §240. Indeed, even the Ninth Circuit has recognized the importance of

equitable remedies in applying traditional trust remedies. *Standard Insurance Company v. Saklad*, 127 F.3d 1179, 1181 (9th Cir. 1997); *Donovan v. Mazzola*, 716 F.2d, 1226, 1239 (9th Cir. 1983) cert. den. 1984, 104 S. Ct. 704.

It is certainly not equitable to the beneficiary to deny relief because the trustee's agents (government agents) have not acted wisely or acted arbitrarily and capriciously. The impact to the beneficiary (the Plaintiff Indians) is the same whether the action was directed by an abusive regulation or the action was directed by an agent abusing his authority under a valid regulation. It is totally inequitable to deny relief because of such a distinction. For the Majority of the Ninth Circuit Panel to hang their hat on this distinction is contrary to trust law principles.

Finally, cases out of the Federal Circuit indicate the Ninth Circuit is just plain wrong. Thus, in *Brown v. United States*, 86 F.3d 1554, 1560-61 (Fed. Cir. 1996), the question was whether the Indian Long Term Leasing Act and action taken under it placed a fiduciary responsibility in the government sufficient to grant jurisdiction for recovery of damages for proof of breach of a specific duty imposed by the regulations. The Federal Circuit cites *Mitchell II* as setting forth the proper test:

> [W]here the Federal Government takes on or has *control or supervision over tribal monies or properties* the federal relation-

> ship normally exists with respect to such monies or properties.

Mitchell II, 463 U.S. at 225, quoted with approval in *Brown*, 86 F.3d at 1560. The Court in *Brown* then concluded the above statement was in the disjunctive - either control or supervision and not both - is required. Furthermore, there are no limiting or clarifying adjectives on either the word "control" or the word "supervision." From this the Federal Circuit concluded.

> The proper test of whether the government has assumed fiduciary duties in the commercial leasing of allotted lands is thus whether, under §415(a) and/or part 162, the Secretary, rather than the allottees, has control or supervision over the leasing programs. All that remains, at this stage of the case, is to apply the test to the statute and regulations at issue.

86 F.3d at 1561.

Clearly there is no room for differentiating whether the control is strictly or solely from the regulations or whether the control is a combination of the regulatory mandate plus the way it is admin-

istered. Accord, *Short v. United States*, 719 F.2d 1133 (Fed. Cir. 1983) *cert.* denied, 467 U.S. 1256 (1984); *Pawnee v. United States*, 830 F.2d 187 (Fed. Cir. 1987). Similarly, in *Navajo Nation v. United States*, 501 F.3d, 1327, 1343 (Fed. Cir. 2007) Rehearing and Rehearing En Banc denied 2008, *cert.* granted October 1, 2008, 129 Sup. Ct. 30, 76 U.S. L. W. 3621, the Court states that "neither Congress nor the Agency needs to codify such actual control for a fiduciary trust relationship that is enforceable by money damages to arise." 501 F.3d at 1343. Without stating whether or not the control comes from the regulations or the individual who administer the regulations, the Federal Circuit makes it clear the attachment of a fiduciary trust relationship depends upon the final results. Citing *Mitchell II* the Court states:

> [W]here the Federal Government takes on or has control or supervision over tribal monies or properties the fiduciary relationship normally exists . . .

Id.

Indeed the Ninth Circuit majority opinion strays from this test set forth by this Court in *Mitchell II*. It is followed in the Federal Circuit. This Court needs to clarify the ruling and make it clear that federal control or supervision is the key and it doesn't matter how that control or supervision is supported or justified.

III.

A Combination of the Federal Government's Commitment to Indians in Housing, the Congressional Acts on Housing, and the Severe Disadvantage the Indian Allotment Act Causes Indians Seeking to Own Their Own Home Places an Enormous Burden on the United States. This Burden Further Supports the Application of Federal Trust Responsibility to the Facts of this Case.

A. History of the Obligation of the United States for Indian Housing.

The United States made its first pledges to provide housing assistance to Indian people in the Removal Treaties of the 1820's and 1830's. In those Treaties, it agreed to compensate tribes and help them establish new homes to replace the ones they left behind. (F. Cohen, Handbook of FederalIndian Law, 1387, §22.05(1) (2005 ed.)("Cohen") Promises continued in the Treaties of the 1850's and 1860's particularly when it started focusing on the assimilation desires to encourage Indians to live in permanent houses and engage in agriculture and to inculcate an "American idea" of private property. *Id.* at 1387-88. See also, *Virginia Davis*, a Discovery of Sorts: Reexamining the Origins of the Federal Indian

Housing Obligation, 18 Harvard Blackletter L. J. 211, 221-225, (2002).1

In 1928, serious deficiencies in the attempt to provide Indian Housing and its serious affect on the health and well-being of Indian peoples was revealed in the Meriam Report. The Report showed that most Indian homes were more crowded and in poorer condition than homes in either urban tenements or rural communities in this country.

Worse, houses built by the Federal Government often only exasperated the problems since they had less ventilation than traditional homes and were less well-suited to Indian needs. *Inst. for Gov't Research*, the Problem of Indian Administration 553-561 (1928) (Lewis Meriam, Technical Director) (Johnson Reprint Corp. 1971); Cohen at 1387-88. Some efforts were made to address the problem in the 1934 Indian Reorganization Act (25 U.S.C §461 et seq. 48 stat. 984,

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[1] There does not appear to be a direct reference to housing in the treaties with the Blackfeet Indians. See the treaty with Blackfeet, October 17, 1885 (11 Stat. 657), which provides for an annual sum of money to be expended for useful goods and provision and other articles as the President may determine (Article IX) and another sum of money annually for instructing Indians in agriculture and mechanical pursuits and other educational endeavors (Article X). Article X specifically requires that the annual fund be used "in any other respect promoting their civilization." The Court of Claims has held that treaty language such as the requisites to "promote civilization" includes a covenant to provide housing. *White Mountain Apache Tribe of Arizona v. United States*, 26 Cl. Ct. 446-67 (1992). See Pregerson in *Marceau I*, specially concurring, App. 119.

Chap. 576) which established a revolving loan fund that tribes could use to build housing and improve Indian land. Cohen at 1388. A short-lived Indian Relief and Rehabilitation Program was created under the Emergency Relief Appropriations Act (48 Stat. On 15, Chap. 48) to provide housing in Indian country in 1936. Cohen at 1388. No real assistance, however, was provided to Indians until 1961 after a devastating report on the state of Indian Housing by a Task Force on Indian Affairs to the Secretary of the Interior (July 10, 1961). As a result, the Public Housing Administration initiated programs to permit Indian Housing Authorities to participate under the United States Housing Act of 1937. The United States Housing Act of 1937 was enacted to help all Americans find decent, safe and sanity living conditions. PL 75-412, 50 Stat. 888 (1937), current version at 42 U.S.C. §1437-1444. In order to benefit, a local housing authority had to be created and it was generally considered that tribes had no authority to do so. See, Staff of Senate Committee on Interior and Insular Affairs, 94th Cong. First Sess., Staff Report on Indian Housing Effort in the United States with Selected Appendences 3 (Comm. Print 1975); see also Mark K. Almer, the Legal Origin of Indian Housing Authorities and the HUD Indian Housing Programs, 13 Am. Indian L. Rev. 109-110-11 (1988).

As Cohen states there then developed a proliferation of programs providing housing assistance to Indian people and tribes culminating with the 1988 Indian Housing Act which created a separate office of

Native American programs within the Department of Housing and Urban Development. Cohen at 1388-89. Even this effort, however, was not effective and its success was admittedly "limited." Remarks of Congressman Lazio, 142 Congressional Record H. 11603, 11613 (Daily edition, September 28, 1996). See also, an Excellent History of Congress' efforts to assist Indian housing in *Dewakuku v. Cuomo*, 107 F. Supp. 2d 1117, 1121-24 (2000) (*"Dewakuku I"*). The final case in this series is *Dewakuku III*, 226 F. Supp. 2d 1199 (D. Ariz. 2002).

The Mutual Help and Homeownership Program ("MHHO Program") was developed to assist low income Indian families in purchasing their own homes administered through regulations promulgated by HUD and the "Indian Housing Handbook". However, because Indian lands are held in trust by the government and alternative financing is not available, a total funding was required through HUD. See a description of this program in *Dewakuku I* at 1122. Even this program proved ineffective to remedy the Indian housing crisis. As the District Court states in *Dewakuku I*:

> The housing needs of Native Americans in Indian country were radically different from the needs of low income Americans in urban areas.

Id.

In 1987, according to a congressional report, 23.3% of the Native Americans, as compared to 6.4% of the total American population, continued to live in substandard housing. "H. R. Rep. #100-604 (1988), reprinted in 1988 U.S.C.C.A.M. 791, 795. On some reservations, the percentage rose as high as 75%. Remarks of Senator Cranston, 135 Congressional Record, S7608 (Daily Ed. June 10, 1988).

Then in 1996, Congress consolidated many of the HUD's programs under the Native American Housing Assistance and Self-Determination Act ("NAHASDA"), 110 Stat. 4018 (1996), 25 U.S.C. §4101 et seq. The Bureau of Indian Affairs developed its own housing improvement program under the authority of the Snyder Act, 42 U.S.C. §5302 (17); 24 C.F.R. §1003.5. Cohen at 1397-98, §2205[3][a]. In addition, the Department of Agriculture's Rural Housing Service Program was designed to meet the needs of Indian communities. 42 U.S.C. §1471-1490s; Cohen at 1398-99, §22.05[4]. Finally, the Department of Veterans Affairs also designed a program that allows a portion of their Housing Loan Guarantee Program to benefit Indians. 38 U.S.C. §3761-3764. However, because of the enormous difficulty of operating the program on trust lands where the Indian does not own fee title to the land, it has met with limited success. Cohen at 1399, §22.05[5].

Notwithstanding all of these efforts on the part of Congress and the federal government to assist in Indian housing, housing in Indian country remains far

below the national standard. According to the U. S. Commission on Civil Rights, 40% of on reservation housing was inadequate, a figure six times the national average in 2003. Over 30% of reservation households were crowded, 18% severely so and all of this leads to ill-health and family abuse. Twenty percent of the reser-vation homes lacked complete plumbing. Less than half were connected to a public sewer system and 32% lacked telephone service.

As a rule, only about half as many Indian people as other Americans own their own homes. U.S. Commission on Civil Rights, A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country 51, 53, 63 (2003); Cohen at 1389. Clearly one of the most telling reasons for this difficulty and poor result is the General Allotment Act of 1887 ("Dawes Act") 24 Stat. 388, 25 U.S.C. §331 et seq. which specifically provides that beneficial title for lands allotted to tribes and to individual Indians is vested in the United States as trustee for the Indian beneficiaries. See, presiding Judge Pregerson, dissenting in opinion below, App. 29, 37. As Cohen states:

> Difficulties foreclosing on real property on trust land discourage conventional lenders from making home finance loans on reservations.

Cohen at 1389. See also U.S. General Accounting Office, Native American Housing; Home Ownership

Opportunities on Trust Lands are limited, GAO-RCED-98-49, at 6-7 (1998).

Obviously, when the entire basis for safe, sanity and decent housing in the United States is based on homeownership with federally guaranteed loans, this system doesn't work in Indian country where the individual Indians do not own their own land and cannot own their own land because of the Indian Allotment Act of 1887.

Cohen cites another factor contributing in the inadequacy of Indian housing.

> Federal housing often failed to comply with basic minimum standards, and might be uninhabitable almost as soon as it was built.

Cohen at 1389, 90 §2205[1]. This is exactly what is involved in the instant case.

Cohen also cites lack of basic infrastructure such as roads, sewage, water and electrical systems and the failure to take into account the cultural standards of the various Indian tribes. He concludes by stating "these problems are exasperated by persistent under-funding of Indian housing program." *Id.*

B. Facts of this Case.

The District Court granted Defendants' Motion to Dismiss for lack of jurisdiction under Rule 12(b). When a 12(b) Motion to Dismiss is made, whether for lack of jurisdiction or failure to state a claim for relief, the Court must take as true, all well-pled facts alleged in the Complaint and construe the Complaint liberally in favor of the Plaintiff. *Dudnikov v. Chalk and Vermilion Fine Hearts, Inc.*, 514 F.3d 1063, 1070 (10th Cir. 2008); *Kottmyer v. Maas*, 436 F.3d 684, 688 (6th Cir. 2006). This point is acknowledged in the 9th Circuit Opinion below. App. 21.

The Amended Complaint in the instant case alleges, in part, as follows:

> 17. The construction of these houses was under the close supervision, mandate and direction of HUD. In this regard, the Blackfeet Housing Authority became the arm or instrumentality of HUD to accomplish the goals and purposes of HUD.
>
> 18. In order to save money or for other reasons unknown to representative plaintiffs and class members, HUD directed that all 153 homes in the first phase of construction be constructed urging chemically-treated wooden foundations even though such foundations were not standard

in the industry at the time, were in violation of state and local building codes, are now in violation of their own regulations, and even though HUD knew, or should have known, that such construction materials could eventually produce contamination and could eventually lead to uninhabitability of these 153 homes.

19. The Defendant Blackfeet Housing acknowledged the mandates and directions of HUD and submitted thereto and proceed to construct the houses using chemically-treated wooden foundations and other defective products and designs, even though they also knew such foundations were substandard in violation of state and local building codes and would eventually produce contamination that could lead to uninhabitability.

20. Because of the use of wooden foundations and because of other design and construction defects, the houses were unable to provide continuous moisture control. This failure caused wide-spread mold

development and septic contamination.

21. The latent defects of the chemically treated wooden foundation and other defective designs have become known to representative plaintiffs and other class members recently. In particular, pathogenic mold, septic-sewage contamination and other toxic and dangerous substances have developed. These molds, septic-sewage contamination and other toxic substances have caused various health and medical conditions and have exasperated other health and medical condition in representative plaintiffs and other class members including their spouses and children and other dependents living in their homes.

22. In addition, many of the houses contained extensive septic - sewage contamination resulting from repeated ground water and septic flooding. Children who have been required to sleep in rooms with mold and septic-sewage contamination have developed health complications that have prevented them from playing sports and that

> resulted in frequent nose bleeding, asthma, hoarseness, headaches and malaise, kidney failure, and cancer. Elderly and other class members have developed similar health complications from exposure to these contaminations.
>
> 23. Because of the pathogenic mold, septic-sewage contamination and other toxic substances, the houses have become unsafe for human habitation and representative plaintiffs and other class members have been damaged.

Amended Complaint, App. 137-138.

Presiding Judge Pregerson, in *Marceau I*, states: "for a more vivid description of Plaintiffs' plight, see *Jessie McQuillan Rotten Deal, Missoula Indep.*, April 6, 2006, available at: http://www.Missoulanews.com/news/newsasp?no=5625 ." App. 97, note. 1.

Clearly, this is another confirmation of what Cohen refers to as failing to comply with basic minimum standards making the houses uninhabitable.

C. The Congressional Mandate to Provide Safe, Sanity and Decent Housing to All Americans.

Starting with the United States Housing Act of 1937, it is clear that Congress gave the Administration the mandate to provide safe, sanitary and descent housing for every American family, including Indians. The purpose was clearly stated in the Declaration of policy:

> It is the policy of the United States . . . to promote the general welfare of the nation by imploying the funds and credit of the Nation, as provided in this act (A) to assist states and political subdivision of states to remedy the unsafe housing condition and the acute shortage of decent and safe dwellings for low-income families . . . .

42 U.S.C. §1437(a). See also, 42 U.S.C. §1437(a)(4)(the goal of providing decent and affordable housing), and the nondiscrimination clause in 42 U.S.C. §1437(b)(3).

At least one District Court has stated that this direction is a mandate and not a precatory desire. *Commonwealth of Pennsylvania v. Lynn*, 501 F.2d 848, 855 (C.A.D.C. 1974).

A separate program called Mutual Help Ownership Opportunity Program was developed under the Housing Act of 1937, which was intended to assist the Indians to obtain homeownership. As previously indicated, however, this did not work very well because Indian Lands are held in Trust by the government and alternative financing is just not

available. *Duwakuku I* at 1122. The home ownership program was then codified in the Indian Housing Act of 1988 which, for the first time established a separate office of Native American programs within the Department of Housing and Urban Development. 102 Stat. 676 (1988); 42 U.S.C. §§1437aa-ff.

Indian Housing Act of 1988 was not very successful and was, in turn, repealed in 1996 by the Native American Housing Assistance and Self-Determination Act of 1996, Pl. 104-330, 110 Stat. 4016 (1996), 25 U.S.C. §4101 et seq. ("NAHSDA"). The regulations are found at 24 C.F.R. §2000.200 et seq. The primary objective of NAHASDA is "to assist and promote affordable housing activities to develop, maintain, and operate affordable housing in safe and healthy environments on Indian reservations and in other Indian areas for occupancy by low income Indian families. . . ." 25 U.S.C. §4131(a)(1).

Among other things, under this Act, HUD has the duty to repair the houses that are under its supervision. 25 C.F.R. §905.270. See *Dewakuku III* at 1203-04. In NAHASDA, Congress reinforced its trust obligation to Indian people stating that Congress, through treaties, statutes and historical relations " . . . has a unique trust responsibility to protect and support Indian tribes and Indian people." That trust is discharged, in part, by "providing affordable homes in safe and healthy environments." 25 U.S.C. §4101. As it relates to this case, it is significant that the houses were constructed in 1979

before both the Indian Housing Act of 1988 or NAHASDA were adopted. Nevertheless, the reference in NAHASDA to the trust responsibility is an acknowledgement of the existence of a previously existing trust responsibility with regard to Indian Housing. See 25 U.S.C. §4101.

D. The Control Exercised by HUD on Indian Housing is Plenary.

The Amended Complaint alleges that the Blackfeet Housing Authority became the arm or instrumentality of HUD to accomplish HUD's goals and purposes. App. at 51-52. Further, the Amended Complaint alleges that Blackfeet Housing submitted to the mandates and directions of HUD, including the use of wooden foundations even though they knew such foundations were substandard, in violation of state and local building codes and even though they knew such foundations would eventually produce contamination that could lead to uninhabitability. *Id.* These allegations are not made in a vacuum. In addition to Cohen's comment that federal housing "often failed to comply with basis minimum standards, and might be uninhabitable almost as soon as it was built" (Cohen at 1389-90) the same thing is also found in the case law. Thus, in *Dewakuku I*, the District Court in Arizona stated:

> Although technically an exercise of tribal sovereignty, the Indian Housing Authority is, in reality, a creature of HUD. HUD's

> regulations "permit" a tribal government to create an Indian Housing Authority. See 24 C.F.R. §§905.108(a), 905.109 (1990). In every instance where a tribal government creates a housing authority, it must follow the exact format prescribed by HUD. See 24 C.F.R. §1905.109. Furthermore, HUD will not enter into a contract with an Indian Housing Authority unless the tribal ordinance creating the Housing Authority is submitted to and approved by it. See *id.* Moreover, the ordinance must be submitted with evidence that the tribal government's enactment was either approved by the Secretary of the Interior or that the Secretary of the Interior has reviewed the ordinance and does not object to it. See *id.* The model tribal ordinance, first conceived by HUD in 1962, sets out the functions of the Indian Housing Authority and lifts its primary purpose as the eradication of unsafe and unsanitary housing conditions on the reservation.

Dewakuku I, 107 F. Supp. 2d at 1121-22.

The same thing is also related in *Dewakuku III*. The *Dewakuku* case is quite similar to the instant case. Dewakuku purchased a home through the Mutual Help Program authorized by the Indian Housing Act. She alleges the home was in such poor condition and so poorly constructed that it had a

malfunctioning electrical system, cracking walls and floors, leaky roof, popping nails, and is both unsafe and overly expensive to heat in the winter. *Dewakuku III*, 226 F. Supp. 2nd at 1201. After several wins at the District Court and one set back in the D.C. Circuit, the case disappears indicating that the matter was obviously settled or otherwise a satisfactory resolution was obtained. In *Dewakuku III*, the Federal District Court specifically held that HUD violated the Administrative Procedures Act by failing to supervise the Hopi Housing Authority and provide the tribal member with a decent, safe and sanitary home. *Id.* at 1206. The Secretary was ordered to cure the defects in the design and construction of Dewakuku's home. *Id.* In reaching that conclusion, the Federal District Court stated that:

> [T]he duty to build standard housing was absolute under the Indian Housing Act. It was only the *method* of doing so that was committed to agency discretion. All parties concede that this duty was not met in the case of Dewakuku's home.

Id. at 1202.

In that case, as in the instant case, HUD insisted that the responsibility for Dewakuku's home ultimately rested with the local Housing Authority. The Court answered that contention as follows:

While at first glance this argument makes sense, a more probing analysis leads the court to reject it. HUD's supervisory powers over tribal authorities when implementing the mutual help program are substantial; indeed, they can be properly termed as near total control. Nothing could have been done on this project without HUD's explicit approval.

Tribal housing authorities have never been seen as wholly independent entities under the Mutual Help Program in the realm of home construction. To insure that the proposed low income housing met applicable standards, Congress, when it passed the Indian Housing Act, anticipated that HUD would provide the requisite technical and supervisory assistance. . . . More concretely, any analysis of the Indian Housing Acts implementing regulations makes clear that HUD maintains oversight over virtually everything the Hopi Housing Authority did regarding the construction of housing under the mutual help program-from cite selection 24 C.F.R. §905.230 (1991) and production method 24 C.F.R. §905.215(a) (1991), to the design 24 C.F.R. §905.250 (1991) and development budget 24 C.F.R. §995.255(a)(2)(1991)....

> In some, assuming the Hopi Housing Authority's plan met all applicable standards, construction on a home like Dewakuku's could never have begun without HUD's prior approval. These standards included the use of "structurally sound" building materials and "cost-effective energy" 42 U.S.C. §1437bb(c)(B) .... HUD's oversight capacities did not stop there. HUD had a substantial role in overseeing post construction inspection and certification.

226 F. Supp. 2d 1202-03.

Further, the Court stated:

> The Hopi Housing Authority is not, in any sense, it own agency or a nonprofit organization with access to contributions, nor is it a private, for profit corporation with capital sufficient to cure the defects in Dewakuku's home. It was created solely to administer the public housing monies received from HUD for Hopi lands. It is an offshoot of HUD - HUD's administrator of public housing construction on Hopi reservations and nothing more.

Id. at 1204. The Court concluded that by asking Dewakuku to sue the Housing Authority, HUD is essentially asking Dewakuku to sue an empty shell in order to avoid direct liability itself. *Id.*

This is precisely the Plaintiffs' contention in the instant case. Suit against the Blackfeet Housing Authority is an empty remedy. HUD made all the decisions. HUD required substandard construction by insisting on wooden foundations where wooden foundations were simply inappropriate. HUD should not be allowed to avoid its responsibility. To do so is one more strike in the breach of responsibilities of the United States to its Indian citizens.

E. Because Indian Land is Held in Trust, Indian People Are at a Great Disadvantage in Housing.

Presiding Judge Pregerson put his finger directly on the main problem of this case. Indian housing is substandard because of Congress. It is Congress's decision to hold tribal land in trust thereby making it practically impossible to obtain home financing like all other citizens.

As Judge Pregerson so eloquently stated:

> Congress's decision to hold tribal land in trust has the practical result of eliminating the private housing market on tribal land because neither individual

> members of the tribe nor the tribe itself has an ownership interest that can be used as security. The government's decision to hold tribal land in trust shows Congress' intent to maintain pervasive control over the resource at stake and gives rise to a fiduciary duty in the government-created tribal housing market.

540 F.3d at 936, App. 37.

Judge Pregerson then refers to the adverse consequences of the government decision to take tribal land in trust.

> [B]y holding tribal land in trust and preventing alienation, the federal government foreclosed many options that exist in most private housing markets.

Id. Tribal land simply cannot be used as collateral.

Not only does this single factor contribute more than anything to the pervasive control that the government exercises over Indian housing but Judge Pregerson makes a persuasive point that the regulations and statutory scheme itself is also pervasive.

> On their face, these statutes only establish a mechanism for lending

> money to tribal housing authorities. However, a review of the statutory framework and the homeownership program reveals a much more pervasive and controlling framework, as detailed above. The homeownership program details the requirements for the housing and connected contracts. There is no language indicating that the goal of the homeownership program is merely to help Indian tribes in managing their land and resources. The regulations do not defer to tribal authorities or tribal decision making, but instead explicitly detail what the tribal authorities are to do each step of the way. **Federal control over the funds and the program is pervasive.**

540 F3d at 940, App. 44. (Emphasis supplied.)

It is respectfully submitted the majority opinion on this point is very weak. Indeed, it is illogical to think that in a trust situation one can only consider the cold statutes and regulations without looking at how they are implemented in fact. Judge Pregerson, on the other hand, is exactly right and has precedent to support him.

The Indian Housing Authorities are nothing but a straw person established by the United States Department of Housing and Urban Development

The statutes and regulation, particularly when considered with the Indian Housing Handbook, and when considered as actually implemented in the instant case leaves no question but that the federal control and supervision over Indian housing is pervasive. It is respectfully submitted the federal control over Indian housing is even more pervasive than the federal control over Indian timber lands in *Mitchell II*. The case begs for further consideration by this Court.

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Respectfully submitted,

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